92-1620

No. 92-____

In the Supreme Court of the United States

OCTOBER TERM, 1992

DEE GRUBBS, THOMAS NELSON, MARLIN HUTTON, RICHARD HILL, and JAMES NANSON,

Petitioners,

v.

L.W.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does a state employer violate its employee's due process rights when the employer brings into the workplace a third person whom the employer knew or should have known posed a risk of danger and the third person injures the employee?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and reverse its judgment.

OPINIONS BELOW

The court of appeals' opinion is reported as *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). The district court's opinion is not reported. Copies of the two opinions are attached as Appendices A and B respectively. A copy of the court of appeals' order denying defendants' petition for rehearing and suggestion of rehearing en banc is attached as Appendix C.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. 28 U.S.C. § 1254(1). Although the court of appeals remanded for further proceedings, that does not affect the Court's jurisdiction under section 1254(1). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Because this case arises on a motion to dismiss, the facts are taken from plaintiff's complaint and assumed to be true. Defendants are employees of the MacLaren School, a state school for juvenile offenders. Defendants hired plaintiff to work at MacLaren as a nurse. It was defendants' policy, and they assured plaintiff, that she would not be working alone with students who were violent personal offenders. They also told plaintiff that the students assigned to assist nurses were trustworthy.

Plaintiff alleges that defendants failed to train her how to respond in an emergency or to use MacLaren's established emergency procedures. They also assigned her to work by herself in the medical clinic when she had not been properly trained. While working in the clinic, plaintiff asked defendants for student assistance, and defendants assigned one of the students, David Blehm, to help her. According to the complaint,

> David Blehm was known within MacLaren and by all defendants as a violent sex offender and as a stalker rapist. All defendants knew that David Blehm had failed a sex offender treatment program at MacLaren and was likely to commit a crime if left alone with another person.

(Complaint, ¶ 24). While alone with plaintiff, Blehm "attacked plaintiff, assaulted her, battered he[r], kidnapped her, raped her, and stole certain of her personal belongings." (Complaint, ¶ 26).

After the assault, plaintiff pursued her state remedies against her employer under the Oregon workers' compensation laws. She also brought a section 1983 action in federal district court claiming that defendants violated substantive due process by

assigning Blehm to assist her and by failing to train her how to respond in an emergency. The district court dismissed the complaint for failure to state a claim. Relying on *DeShaney v. Winnebago Social Services*, 489 U.S. 189 (1989), the district court reasoned that the State lacked a custodial relationship with plaintiff that would impose a duty on the State to protect her from third persons. It recognized that defendants may have committed a tort under state law but concluded that "the due process clause does not transform every tort committed by a state actor into a constitutional violation."

The Ninth Circuit reversed. It agreed with the district court that the State ordinarily has no constitutional duty to protect one person from another. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). It stated, however, that this general rule "is modified by two exceptions: (1) the 'special relationship' exception; and (2) the 'danger creation' exception." *Ibid.* The court based its holding on "the 'danger creation' exception." It reasoned that by putting Blehm in proximity with plaintiff, defendants "used their authority as state correctional officers to create an opportunity for Blehm to assault [plaintiff] that would not otherwise have existed." *Ibid.* The Court of Appeals concluded that "because Defendants affirmatively created the dangerous situation which resulted in [plaintiff's] assault" and because the jury could infer that defendants acted with deliberate indifference, the district court erred in dismissing plaintiff's complaint. *Id.*, at 122–23.

REASONS FOR ALLOWING THE WRIT

The question presented by this case is a recurring one. The Court has recognized that substantive due process applies not only to legislation but also to the acts of state employees who administer state programs. *See Martinez v. California*, 444 U.S. 277 (1980). The Court has recognized, however, that not every

injury caused by a state employee's acts constitutes a substantive due process violation. *DeShaney v. Winnebago Social Services*, 489 U.S., at 202–03. Although the point has not always been free from doubt, the Court's more recent decisions have made clear that injuries caused by a state employee's acts ordinarily should be left to state tort law, not turned into federal constitutional violations. *Collins v. City of Harker Heights, Texas*, 112 S. Ct. 1061, 1070 (1992).

Although the general outlines are clear, the problem facing the circuits has been to identify the principle that separates acts that are merely tortious from those that are unconstitutional. The problem becomes more acute when, as in this case, the injury is not committed by a state actor but by a third person whose acts are charged to the State. The circuits that have addressed this issue have divided over the answer — a division that reflects a longstanding disagreement among the circuits over the principles that should inform substantive due process analysis. The Ninth Circuit's reasoning presents one side of the conflict.

In this case, the Ninth Circuit began with the proposition that, as a general rule, the State is not responsible for injuries committed by a third person. *L. W. v. Grubbs*, 974 F.2d, at 121. It concluded, however, that this general rule "is modified by two exceptions: (1) the 'special relationship' exception; and (2) the 'danger creation' exception." *Ibid.* Recognizing that the "special relationship" exception is typically limited to custodial situations, the Ninth Circuit based its decision on what it identified as the "danger creation" exception. According to the Ninth Circuit, this exception applies when the State or its employees affirmatively create a dangerous situation, as opposed to fail to correct or warn about an existing danger. The exception the Ninth Circuit

recognized is far reaching. A state employee[1] who allows a potentially dangerous prisoner to escape during transport would be subject to suit under the Ninth Circuit's reasoning for violating the substantive due process rights of a citizen injured by the escaped prisoner. *See Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied sub nom. Spears v. Cornelius*, 494 U.S. 1066 (1990). The state employee would have created the danger by putting the prisoner and the citizen in proximity, and the plaintiff, to make out a federal claim, would have to allege only that the employee acted with deliberate indifference. The same result would follow if an employee transporting a dangerous substance allowed it to escape and a bystander was injured as a result. Indeed, if the employee simply drove recklessly during the course of his or her state job and injured another motorist, the employee's act would appear to come within the exception the Ninth Circuit has recognized. In each of these cases, the employee would have affirmatively created the danger and the only question would be whether the person injured by the employee's act could prove that the employee acted with deliberate indifference.

The Ninth Circuit's decision thus federalizes much of state tort law. The only distinction the Ninth Circuit recognizes between tort law and constitutional law is that the state employees must be active (not passive) tortfeasors and the plaintiff must allege something more than mere negligence. Deliberate indifference will suffice. If these two criteria are met, a plaintiff will

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[1] Because the Eleventh Amendment prohibits suits against the State, section 1983 actions involving state actors may be brought only against state employees, not the entity that employed them. In this case, plaintiff sued her state supervisors and other state employees who allegedly made the decisions at issue here.

state a substantive due process claim under the Ninth Circuit's reasoning. The Ninth Circuit's decision does precisely what this Court has recognized it should not do. It uses substantive due process as a form of federal tort law to remedy injuries caused by governmental acts, which should be left to state law. *See Collins v. City of Harker Heights, Texas*, 112 S. Ct., at 1070. And it does so in a suit by a public employee against her supervisors even though the Court explained in *Collins* that a court should be especially reluctant to extend substantive due process to "claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship." *Ibid.*

The Ninth Circuit never discusses the principles that inform the Court's decision in *Collins*. Rather, it distinguishes *Collins* as a case that simply presents a different issue. *See L.W. v. Grubbs*, 974 F.2d, at 122. The Ninth Circuit is not alone in reading *Collins* and *DeShaney* narrowly. After *Collins* was decided, the en banc Eighth Circuit reaffirmed that a state employee's acts will rise to the level of a "constitutional tort" when "the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006, 1009, 1010 (8th Cir. 1992) (en banc), *cert. denied*, ___ S. Ct. ___ (1993). The Eleventh Circuit also holds, in a case decided before *Collins*, that a substantive due process claim will lie when a state actor "affirmatively create[s] a potentially dangerous situation." *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d, at 357.

Four other circuits have taken a different view. They have declined to treat a substantive due process claim as a "constitutional tort," to use the Eighth Circuit's term, *see Gregory v. City of Rogers, Arkansas*, 974 F.2d, at 1009, or to find a constitution-

al violation when the state has created the danger. The First Circuit held that the State had not violated a mentally ill plaintiff's substantive due process rights even though it recognized that the State's actions "plausibly could be said to have rendered [the plaintiff] more vulnerable to danger." *Monahan v. Dorchester Counseling Center*, 961 F.2d 987, 993 (1st Cir. 1992). The court reasoned that to establish a substantive due process violation, a plaintiff must show either a custodial relationship or "some coercive exercise of government power which either forcefully restrain[s] a party from protecting himself from harm or restrain[s] others from protecting him." *Ibid.* The First Circuit explained that to the extent the Eleventh Circuit's decision in *Cornelius v. Town of Highland Lake, Alabama*, *supra*, is inconsistent with this principle, "we decline to follow it." *Ibid.* And the First Circuit questioned whether *Cornelius*, a case on which the Ninth Circuit based its decision here, was still good law after the Court's decision in *Collins*. *Monahan v. Dorchester Counseling Center*, 961 F.2d, at 993-94.[2]

The Seventh Circuit, the District of Columbia Circuit, and the Second Circuit also have rejected the notion that the State violates due process when it creates the danger. *See Walker v. Rowe*, 791 F.2d 507, 509 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986) (rejecting claim that correction officials' "acts and omissions . . . which arguably increased the danger to which the [prison] guards were exposed" violated substantive due process); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir.

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[2] Because the First Circuit's decision preceded the Eighth Circuit's decision in *Gregory* and the Ninth Circuit's decision here, the First Circuit does not discuss either case. The First Circuit does attempt to reconcile an earlier Ninth Circuit case, *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), by reading it narrowly. *See Monahan v. Dorchester Counseling Center*, 961 F.2d, at 993.

1986) (rejecting claim that placing a dangerous inmate in an area normally housing more easily controlled prisoners, which led to corrections employee's injuries, violated employee's substantive due process rights); *McClary v. O'Hare*, 786 F.2d 83, 85, 88–89 (2d Cir. 1986) (rejecting claim that "creating a high risk of danger to decedent" by deliberately disregarding safety laws violated his substantive due process rights). These circuits, like the First Circuit, require a show of coercive government action. Although these cases were decided before *DeShaney* and *Collins*, nothing in either *DeShaney* or *Collins* provides any reason for these circuits to reconsider their decisions.

The principles that inform the circuits' substantive due process analysis are squarely in conflict. Indeed, the District of Columbia Circuit considered a substantive due process claim in *Washington v. District of Columbia*, *supra*, that is substantially the same as the one plaintiff raises here. The District of Columbia Circuit, however, reached a different result than the Ninth Circuit did and articulated a different guiding principle. The plaintiff in *Washington* was a prison guard. He alleged that "a prisoner who was known to be psychologically unstable and violent was placed in a cell block normally housing more easily controlled prisoners." 802 F.2d, at 1479. Despite that danger, neither the plaintiff in *Washington* nor the other guards were told of the threat this prisoner posed. *Ibid.* When the plaintiff later entered the prisoner's cell in an attempt to control a fire the prisoner had set, the prisoner attacked the plaintiff with a piece of steel tubing. *Ibid.* The plaintiff then brought suit alleging that the prison officials had violated his substantive due process rights by placing a known violent prisoner in an area normally housing more easily controlled prisoners.

The District of Columbia Circuit rejected the plaintiff's claim. It explained:

> The reason the state has a constitutional duty to protect those in its custody, but no such duty to protect others, was explained by the Seventh Circuit in *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986). There the circuit court rejected the very argument advanced here by appellant: "These cases [recognizing that prisoners and others in the state's charge have a constitutional right to protection] are based on the principle that when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection." Thus the state is constitutionally obligated to protect prisoners because it has forced them into a position where they cannot help themselves.
>
> Prison guards, unlike the prisoners in their charge, are not held in state custody. Their decision to work as guards is voluntary. If they deem the terms of their employment unsatisfactory, *e.g.*, if salary promotion prospects or safety are inadequate, they may seek employment elsewhere. The state did not force [the plaintiff] to become a guard, and the state has no constitutional obligation to protect him from the hazards inherent in that occupation. *Accord id.* ("The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten.").

802 F.2d, at 1481-82.

The District of Columbia Circuit's reasoning in *Washington* is difficult to reconcile with the Ninth Circuit's reasoning here. In both cases, corrections officials allegedly put a known violent offender[3] in a situation where a corrections employee would

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[3] In this case, the offender was a juvenile who was neither charged nor convicted criminally. *See* Or. Rev. Stat. § 419.476 (authorizing juvenile court (continued...)

expect to find a more trustworthy person. In both cases, corrections officials allegedly failed to warn the employee, and in both cases the employee was harmed. The different result in the two cases stems from the differing principles that inform the courts' substantive due process analysis. The District of Columbia Circuit requires, as do the First, Second, and Seventh Circuits, a showing of either custody or coercive government action that forcibly prevents a person from protecting him or herself. All that the Eighth, Ninth, and Eleventh Circuits require is a showing that a state actor affirmatively created a dangerous situation or exposed the plaintiff to harm from third persons.

In defendants' view, the Court's decisions in *DeShaney* and *Collins* demonstrate that the First, Second, Seventh, and District of Columbia Circuits have the better of the argument. By contrast, the Eighth, Ninth, and Eleventh Circuits have not followed the principles that underlie either *DeShaney* or *Collins*. Rather, before *DeShaney* was decided, the Ninth Circuit borrowed principles from tort law to define the scope of substantive due process, *see Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987),[4] and it has continued to adhere to those

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[3](...continued)
to assert jurisdiction over child under 18 who commits an act that if done by an adult would constitute a crime). In *Washington*, the offender was a convicted felon held in a District of Columbia prison.

[4] This notion appears to have originated with *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, the Court rejected the plaintiff's substantive due process claim against the California Parole Board because the causal connection between the Board's decision to release an inmate and the inmate's later murder of the plaintiff's decedent was too remote. *Martinez v. California*, 444 U.S., at 284–85. After *Martinez*, some courts of appeals assumed that the converse of *Martinez*' holding was true — that if the plaintiff showed a closer causal connection between the State's tortious act and his or her injury, then the State's act would rise to the level of a constitutional violation. *See Cornel-*
(continued...)

tort principles by limiting *DeShaney* and *Collins* to their facts. *DeShaney* addressed the State's failure to protect a child from parental abuse, and the Ninth Circuit has reasoned that *DeShaney* does not bar a substantive due process claim when the State creates the danger rather than fails to correct it. Similarly, the Ninth Circuit interpreted *Collins* as leaving the question presented by this case open, and the court accordingly found nothing in *Collins* that would require it to reconsider either its earlier decisions or its reliance on the Eleventh Circuit's decision in *Cornelius*. *See L.W. v. Grubbs*, 974 F.2d, at 122.

The decisions in *DeShaney* and *Collins* have thus done nothing to abate the conflict. Rather, the conflict has continued even though the Ninth Circuit's reading of *Collins* and *DeShaney* leads to anomalous results, as a comparison of the facts in *Collins* and this case demonstrates. In *Collins*, a government employee's job put him in proximity with dangerous gas, which killed him. In this case, a government employee's job put her in proximity with a dangerous sex offender, who assaulted her. In both cases, the plaintiff alleged that the government employer knew of the danger and failed either to warn the employee of the known risk or to train him or her.[5] And in both cases, the plain-

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[4](...continued)
ius v. Town of Highland Lake, Alabama, 880 F.2d 348, 353-54 (1989). Borrowing principles from tort law, these courts held that if a "special relationship" existed between the State and the victim or if the State affirmatively created the danger, that would be sufficient to state a substantive due process claim. *Ibid.*

[5] In *Collins*, the plaintiff sued the city, alleging that the city "was on notice of the dangers to which [sanitation department] employees were exposed." *Collins v. City of Harker Heights*, 112 S. Ct., at 1064 at n. 1. Plaintiff also alleged that the city failed to "train its employees, or to warn them about *known* risks of harm," contrary to state law. *Id.*, at 1070 (emphasis added). The Court
(continued...)

tiffs' allegations were sufficient to establish deliberate indifference.

If putting an employee in proximity with dangerous gas does not constitute a substantive due process violation, as the Court held in *Collins*, it is difficult to see why putting an employee in proximity with a sex offender should lead to a different result here. The Ninth Circuit's rationale — that the state employer affirmatively created the danger in this case — does not provide a legitimate basis for distinguishing the two cases. For the purposes of substantive due process analysis, what difference should it make whether the government employer sends the known danger into the employee's work area (as it allegedly did here) or sends its employees into a known dangerous work area (as it allegedly did in *Collins*)?[6]

As noted above, the Ninth Circuit's only explanation was that *Collins* did not address the issue presented by this case. The court relied on one passage from *Collins* for that proposition. That passage states:

> A fair reading of petitioner's complaint does not charge the city with a willful violation of Collins' rights. Petitioner does not claim that the city or any of its agents deliberately harmed her husband. In fact, she does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured.

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[5](...continued)
assumed that the plaintiff's allegations were sufficient to establish "deliberate indifference" on the city's part. *Id.*, at 1068.

[6] Although the City of Harker Heights did not order its sanitation workers to go into the sewer, it hired them for that purpose and in that sense sent them into an area, without any warning, that it allegedly knew to be dangerous.

Collins v. City of Harker Heights, 112 S. Ct., at 1068–69. The Ninth Circuit focused on the last sentence in this passage as the basis for distinguishing *Collins*, *see L.W. v. Grubbs*, 974 F.2d, at 122, and in so doing failed to recognize the limited point this sentence makes. The city was the sole defendant in *Collins*, and the plaintiff had alleged that the city was on notice of the dangers the gas in the sewers posed to its employees. *Collins v. City of Harker Heights*, 112 S. Ct., at 1064 n.1, 1070. Because respondeat superior does not apply in section 1983 actions, *see id.*, at 1067, what the supervisor instructed the plaintiff's husband to do or what the supervisor knew or should have known has nothing to do with the city's liability. The last sentence quoted above bears on the issue before the Court — whether the city was liable — only to the extent it reinforces the initial distinction the passage draws. The passage focuses on the absence of any allegation that the city acted willfully or deliberately to harm the plaintiff's husband, and the last sentence simply drives that proposition home.

The point, however, is not so much that *Collins* demonstrates that the Ninth Circuit erred. Rather, the point is that *Collins* has not resolved the conflict among the circuits that existed before *Collins* was decided. Or, if the Ninth Circuit's reading of *Collins* is correct, this case presents the question *Collins* noted but did not reach — whether affirmatively exposing an employee to a risk of injury of which the employee's supervisor either was aware or should have been aware violates substantive due process. In either event, certiorari should be granted to resolve the conflict. The issue that divides the circuits is a significant one. The Court long ago recognized that federal courts should not use substantive due process to second guess the wisdom of state legislation. Neither should it be used to remedy the adminis-

trative decisions of state government or the administrative acts of state employees.

To say this is not to diminish the injuries plaintiff allegedly suffered or to suggest that those injuries, if caused by defendant's tortious conduct, do not warrant some remedy. Rather, the point is that plaintiff's remedy is to be found in state law, not the federal constitution.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
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APPENDIX A

L.W.*, Plaintiff-Appellant,

v.

Dee GRUBBS, Thomas Nelson; Marlin Hutton; Richard Hill; James Nanson, Defendants-Appellees.

No. 91-35449.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 7, 1992.
Decided Sept. 3, 1992.

Thomas K. O'Shaughnessy, Kerry M. Smith, Black Helterline, Portland, Or., for plaintiff-appellant.

Rives Kistler, Asst. Atty. Gen., Salem, Or., for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before: GOODWIN, Senior Circuit Judge, TANG and THOMPSON, Circuit Judges.

GOODWIN, Senior Circuit Judge:

L.W., a registered nurse employed by the State of Oregon at a medium security custodial institution for young male offenders, was raped and terrorized by an inmate. She sued under 42 U.S.C. § 1983 for damages, and appeals the district court's judgment of dismissal under Fed.R.Civ.P. 12(b)(6) for failure to state a claim against defendants Dee Grubbs, Thomas Nelson, Marlin Hutton, Richard Hill and James Nanson (collectively, "Defendants"). We reverse.

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* The case was originally filed under the full name of the plaintiff, but because the disposition called for publication, the court has decided on its own motion to delete the full name of the plaintiff.

Defendants are state employees who served as L.W.'s supervisors at the custodial institution. According to L.W.'s complaint, which, for Rule 12 purposes, we must accept as true, *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), Defendants hired her to work in the institution's medical clinic and led her to believe that she would not be required to work alone with violent sex offenders. On August 15, 1989, however, Defendants selected inmate David Blehm to work with L.W. alone in the clinic. Blehm was a violent sex offender who had failed all treatment programs at the institution. According to his files, Blehm was considered very likely to commit a violent crime if placed alone with a female. Once alone with L.W. in the clinic, Blehm assaulted, battered, kidnapped and raped her. He also stole certain of her personal belongings.

In her complaint, L.W. alleged that the foregoing facts constituted conduct, under color of state law, which deprived her of her right to liberty without due process of law. L.W. sued on the theory that the government actors violated her constitutional rights by intentionally placing her in a position of known danger, that is, in unguarded proximity with an inmate whose record they knew included attacks upon women.

Defendants moved to dismiss the case for failure to state a claim, arguing that no due process right of L.W. was affected because she was not in custody. The district court granted the motion, agreeing that only a person in official custody could state a section 1983 claim when injured by a third party. In addition to its Rule 12 motion, Defendants had also moved the court for summary judgment on the ground that *res judicata* bars L.W.'s action because she accepted worker's compensation for the incident. The district court did not reach this motion. We will first consider the motion to dismiss.

I. *Section 1983 and Third Party Harm*

To state a section 1983 claim, the plaintiff must allege that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a constitutional right. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (as amended). In this case involving harm inflicted by a third party who was not a state actor, Defendants argue that L.W.'s claim is barred for three reasons. First, Defendants assert that, under *DeShaney v. Winnebago County, Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the absence of a custodial relationship between L.W. and the Defendants bars her claim. Second, Defendants argue that, under *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), L.W.'s status as an employee of the Defendants bars her claim. Finally, Defendants argue that L.W.'s complaint is insufficient because it alleges "mere negligence."

A. Custody

Relying on *DeShaney*, the district court ruled that victim custody was a prerequisite to L.W.'s claim. In so ruling, the court misread *DeShaney* and overlooked circuit case law to the contrary.

As a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties. *DeShaney*, 489 U.S. at 197, 109 S.Ct. at 1004; *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir. 1987).

This general rule is modified by two exceptions: (1) the "special relationship" exception; and (2) the "danger creation" exception. Although some cases have blended the two exceptions

together, *see, e.g., Ketchum*, 811 F.2d at 1247, the distinction is important.

After the state has created a special relationship with a person, as in the case of custody or involuntary hospitalization, cases have imposed liability under a due process theory, premised on an abuse of that special relationship. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 314–325, 102 S.Ct. 2452, 2457–2463, 73 L.Ed.2d 28 (1982), (patient in custodial facility for the mentally retarded denied protection from violence); *Estelle v. Gamble*, 429 U.S. 97, 103–104, 97 S.Ct. 285, 290–291, 50 L.Ed.2d 251 (1976), (prisoner denied Eighth Amendment right to medical care).

The "danger creation" basis for a claim, by contrast, necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger. *See Wood v. Ostrander*, 879 F.2d 583, 588–90 (9th Cir.1989) (plaintiff not in custody but state officer created the danger), *cert. denied*, ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *cf. DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006 (plaintiff not in custody and state officer did not create the danger). *DeShaney* did not rule that custody was required where the state affirmatively causes the harm. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006. (emphasis added). *DeShaney* thus suggests that had the state created the danger, Joshua might have recovered even though he was not in custody.

In the Ninth Circuit, the law concerning the "danger creation" exception begins with *Wood*, *supra*. In *Wood* (decided

after *DeShaney*), we held that a woman who was raped by a third party could hold a police officer liable under section 1983. In that case, the officer had stopped the car in which the plaintiff was riding, arrested and removed the driver, impounded the car, and left the plaintiff stranded in a high crime area. She was subsequently raped. Even though the plaintiff had not been in state custody, we allowed her claim to go forward because the jury could have found that the defendant officer had affirmatively created the particular danger that exposed her to third party violence.

Similarly, in the present case, the actions of the Defendants created the danger to which L.W. fell victim by elevating Blehm to cart boy status. According to the complaint, the Defendants knowingly assigned Blehm to work with L.W. despite their knowledge that: (1) Blehm was not qualified to serve as a cart boy; (2) Blehm had an extraordinary history of unrepentant violence against women and girls; (3) Blehm was likely to assault a female if left alone with her; (4) L.W. would be alone with Blehm during her rounds; and (5) L.W. would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders. The Defendants, like the officer in *Wood*, thus used their authority as state correctional officers to create an opportunity for Blehm to assault L.W. that would not otherwise have existed. The Defendants also enhanced L.W.'s vulnerability to attack by misrepresenting to her the risks attending her work.

These allegations support section 1983 liability. L.W. is not seeking to hold Defendants liable for Blehm's violent proclivities. Rather, L.W. seeks to make Defendants answer for their acts that independently created the opportunity for and facilitated Blehm's assault on her. *Cf. Wood*, 879 F.2d at 587–88; *see also Cornelius*

v. Town of Highland Lake, 880 F.2d 348, 354–59 (11th Cir. 1989) (City and prison officials' actions in operating prisoner work squad in populated area could form basis for section 1983 liability where, despite knowledge of prisoners' violent dispositions, officials failed to exercise adequate control and supervision, resulting in kidnapping and terrorizing of a city resident; the officials "significantly increased both the risk of harm to the plaintiff, and the opportunity for the inmates to commit the harm"), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990).

Because custody is not a prerequisite to the "danger creation" basis for a section 1983 third party harm claim, *see also Freeman v. Ferguson*, 911 F.2d 52, 54–55 (8th Cir.1990); *Cornelius*, 880 F.2d at 354–55, and because Defendants affirmatively created the dangerous situation which resulted in L.W.'s assault, the district court erred in dismissing L.W.'s claim for a failure to allege a custodial relationship between her and the Defendants.

B. Employment

Defendants next argue that L.W.'s status as a state employee should bar her claim. Defendants mistakenly rely on *Collins*, ___ U.S. ___, 112 S.Ct. 1061.

In *Collins*, city sanitation employee Collins died of asphyxia after entering a manhole. Collins' estate subsequently sued the city under section 1983 for violation of his due process rights. The Fifth Circuit rejected the claim on the ground that section 1983 required proof of an abuse of governmental power separate from proof of a constitutional violation, and that Collins had not proven such an abuse.

Although the Supreme Court affirmed the Fifth Circuit's dismissal of Collins' section 1983 claim, it rejected the circuit court's reasoning. The Court held that section 1983 does not

require a separate showing of an abuse of governmental power. *Collins*, ___ U.S. at ___, 112 S.Ct. at 1065. In so holding, the Court made clear that Collins' status as a city employee did not affect the merits of his claim. *Id.* ("The employment relationship . . . is not of controlling significance.")

In rejecting Collins' claim, the Court held that Collins had not alleged affirmative culpable acts by the city. According to the Court, Collins' complaint alleged merely that "the city deprived him of life and liberty by failing to provide a reasonably safe work environment." *Id.* ___ U.S. at ___, 112 S.Ct. at 1069 (footnote omitted). The Court pointed out that Collins had *not* alleged that "his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured." *Id.*

Under *Collins*, we cannot dismiss L.W.'s claim against Defendants merely because she was an employee supervised by them. Moreover, the shortcomings identified by the Court in Collins' complaint do not exist in L.W.'s complaint. Unlike Collins, L.W. alleges that the Defendants took affirmative steps to place her at significant risk, and that they knew of the risks. Contrary to Defendants' arguments, *Collins* actually supports L.W.'s claim.

C. "Mere Negligence"

Finally, Defendants argue that L.W.'s claim is barred because it alleges "mere negligence" and section 1983 does not permit such claims. *Davidson v. Cannon*, 474 U.S. 344, 347–48, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). Defendants misread L.W.'s complaint, however. Neither the Supreme Court nor this court has stated what mental state beyond "mere negligence" is required for due process third party harm claims. The Supreme Court and this court have observed that not every tort claim

automatically becomes a constitutional wrong. Something more than an ordinary tort is required. We need not address the hypothetical boundaries here, however, because L.W. has alleged facts demonstrating official deliberate indifference in creating the danger. *See Wood*, 879 F.2d at 588. L.W. has alleged that Defendants knew that Blehm was a violent sex offender who had failed all treatment and was likely to assault a woman if alone with her, and that, even knowing this, Defendants intentionally assigned Blehm to work alone with L.W. in the clinic.

D. L.W. Has Stated a Claim Under Section 1983

L.W. has alleged that she was deprived of her liberty because Defendants, acting in their capacity as state correctional officers, affirmatively created a significant risk of harm to her, and did so with a sufficiently culpable mental state. Accordingly, we hold that L.W. has stated a claim under section 1983 for violation of her due process rights.

II. *Res Judicata*

In addition to arguing that L.W. has not stated a claim under section 1983, Defendants argue that L.W.'s receipt of Oregon state worker's compensation bars her claim under either the election of remedies doctrine, or under the theory that the state has already provided her a remedy that conforms to due process of law and, therefore, has not deprived her of liberty without due process. Because the district court granted Defendants' motion to dismiss, it declined to reach the *res judicata* argument. We likewise decline to discuss these issues. This court reviews actual decisions. We hold that the complaint stated a Section 1983 claim. It is for the trial court first to decide the effect of affirmative defenses, if any, that the state actors may plead.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
[List of attorneys omitted in printing]

Lynn WENTZ,	)	
	)	
Plaintiff,	)	
	)	Civil No. 90-661-FR
v.	)	
	)	OPINION
DEE GRUBBS, THOMAS NELSON,	)	
MARLIN HUTTON, RICHARD HILL and JAMES NANSON,	)	
	)	
Defendants.	)	

FRYE, Judge:

The matters before the court are 1) the combined motion to dismiss and motion for summary judgment of defendants, Dee Grubbs, Thomas Nelson, Marlin Hutton, Richard Hill and James Nanson (#20); and 2) the cross-motion for partial summary judgment of plaintiff, Lynn Wentz (#27). Wentz brings this action under 42 U.S.C. § 1983 against five administrative officials of the MacLaren School, a detention and training center for male criminal offenders under the age of eighteen. Wentz seeks to recover damages sustained when she was assaulted by a MacLaren inmate, David Blehm.

ALLEGATIONS OF THE COMPLAINT

Lynn Wentz is a registered nurse who was employed by the State of Oregon on June 18, 1989 to work at the MacLaren

School. The MacLaren School is a training school for male juvenile criminal offenders.

Defendants are employees of the State of Oregon. Richard Hill is the superintendent of the MacLaren School and the supervisor of Marlin Hutton, his executive assistant. Tom Nelson is the program director for the MacLaren Medical Clinic and the supervisor of Dee Grubbs. Dee Grubbs is the director of nursing for the MacLaren Medical Clinic and the immediate supervisor of Wentz. All of the defendants are responsible for the safety and security of employees working in the MacLaren Medical Clinic.

When Wentz was hired, Grubbs assured her that she would receive training in security measures and in self-defense. Nelson and Grubbs assured Wentz that nurses did not work alone in the MacLaren Medical Clinic with known violent offenders. Defendants also assured Wentz that there were security measures in place to protect her.

Defendants did not instruct Wentz on how to respond to an emergency, including how to use the established emergency procedures of the MacLaren School.

The policy of defendants was to have non-violent inmates at the MacLaren School assist the nursing staff as cart boys in the MacLaren Medical Clinic. Grubbs and Nelson told Wentz that the cart boys were property offenders who had earned trust at the MacLaren School.

On August 15, 1989, Wentz was assigned to work the afternoon shift in the MacLaren Medical Clinic. Grubbs instructed Wentz to use a student named David Blehm as a cart boy. Blehm was known within the MacLaren School and by all defendants as a violent sex offender and a stalk rapist. All defendants knew that Blehm had failed a sex offender treatment

program at the MacLaren School and was likely to commit a crime if he was alone with a female.

A security officer picked up Blehm at his cottage and escorted him to the MacLaren Medical Clinic to assist Wentz. The officer knew that Wentz was alone in the clinic. Blehm attacked Wentz and assaulted, battered, kidnapped and raped her, as well as stealing certain of her personal belongings.

All defendants had been warned before August 22, 1989 that it was not safe for Wentz to work in the MacLaren Medical Clinic by herself, and that placing her alone in the medical clinic would expose her to a high risk of attack. Nonetheless, defendants caused Wentz to believe that she would be secure working in the medical clinic and then failed to take reasonable steps to protect her. As a result of the willful and grossly negligent conduct of defendants, Wentz was assaulted and battered and therefore deprived of her liberty without due process of law in violation of her federal constitutional rights.

UNDISPUTED FACTS

Wentz filed a worker's compensation claim with the State of Oregon following her injury. This claim was accepted by the State Accident Insurance Fund (SAIF) on September 21, 1989. SAIF has paid all of the medical bills of Wentz and has partially compensated her for lost wages. The SAIF claim is not closed. While Wentz has returned to work for the State of Oregon, she no longer works at the MacLaren School.

CONTENTIONS OF THE PARTIES

Defendants contend that the claim of Wentz under 42 U.S.C. § 1983 should be dismissed on the grounds that the allegations of this claim do not state a cause of action for the deprivation of a liberty interest without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitu-

tion. Defendants argue that because Wentz was not in the custody of the State of Oregon, she has no claim for the deprivation of her liberty interest under the United States Constitution. Defendants also assert that Wentz's worker's compensation claim has a res judicata effect barring this action.

Wentz moves the court for partial summary judgment in her favor on the affirmative defenses of defendants.

Wentz contends that her complaint states a claim under 42 U.S.C. § 1983 because the State of Oregon had a duty to protect her since she had a special relationship with the State of Oregon and the State of Oregon created the danger to her. Wentz argues that the State of Oregon had the duty to protect her against private violence in a non-custodial setting because the State of Oregon took affirmative action that increased the danger of violence to her and made her vulnerable to violence beyond the level it would have been absent the action taken by the State of Oregon.

Wentz contends that she has adequately alleged that she was assured that she would not have to work alone with a violent offender, and that if she indeed had to work alone with a violent offender, then she was not properly trained in how to respond in an emergency; that defendants knew the clinic was staffed in an unsafe manner; that defendants assigned Blehm, a violent sex offender, who had not been approved as a cart boy; and that defendants knew or should have known that Blehm was likely to commit a crime if he was left alone with a female.

In addition, Wentz asserts that there was a special relationship between her and the State of Oregon because defendants were aware of a specific risk of harm to her; affirmatively committed itself to protect her; and then affirmatively placed her in a position of danger. Wentz also argues that she creates the

special relationship required between her and the State of Oregon.

Finally, Wentz argues that the payment made to her by SAIF is not res judicata in the courts of the State of Oregon because her SAIF claim did not include claims for non-economic damages and was not litigated in court.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) will only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). The review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 737 (9th Cir. 1987).

The court must accept the facts alleged in the complaint as true, and plaintiff is entitled to all reasonable inferences from the pleadings. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

ANALYSIS

42 U.S.C. § 1983 creates no substantive rights but provides a remedy for the deprivation of rights guaranteed elsewhere in the Constitution or federal laws. *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). To prevail in this case, Wentz must show that defendants, under color of state law, deprived her of a right secured to her by the Constitution or the laws of the United States; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled*

on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986) — that is, that "defendants deprived [her] of her liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." Complaint, paras. 29, 33 and 35. Accordingly, the issue in this case is whether the alleged acts of the state defendants support her claim that she was deprived of her right to liberty without due process of law in violation of her rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The due process clause of the fourteenth amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Wentz asserts that the State of Oregon deprived her of liberty by causing her to believe that she would be secure working in the medical clinic and then by failing to take reasonable steps to protect her from injury. The claim of Wentz implicates the substantive rather than the procedural component of the due process clause.

There is, in general, no constitutional duty of state officials to protect members of the public at large from crime. *See Martinez v. California*, 444 U.S. 277, 284–85 (1980); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990). However, courts have held that a duty to protect members of the public does arise in particular circumstances by virtue of a "special relationship" between state officials and these members of the public. *Robinson v. California*, 370 U.S. 660 (1962) (the state is required by the due process clause of the fourteenth amendment to provide adequate medical care to incarcerated prisoners); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the state is required by the due process clause of the fourteenth amendment to provide reasonably safe conditions of confinement to mentally retarded, involuntarily committed persons in state institutions).

The most recent Supreme Court case involving the substantive component of the due process clause of the fourteenth amendment is *DeShaney v. Winnebago County Dept. of Social Servs.*, ___ U.S. ___, 109 S.Ct. 998 (1989). In *DeShaney*, the Court found that the complaint, alleging that a boy was beaten and permanently injured by his father, failed to state a claim for a violation of the boy's substantive due process rights against social workers and other local officials who received complaints that the boy was being abused by his father, and had reason to believe that this was the case, but did not act to remove him from his father's custody.

Justice Rehnquist, writing for the majority, stated "[a]s a general matter . . . we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 109 S.Ct. at 1004. The Court reviewed prior cases involving substantive due process and recognized that in "certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 1004–05. However, the Court summarized:

> Taken together, [the cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. *See Youngberg v. Romeo*, *supra*, 457 U.S., at 317, 102 S.Ct., at 2458 ("When a person is institutionalized — and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist"). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human

> needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. (Citations omitted). The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of to act on his own behalf. (Citation omitted). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 1005–06 (footnotes omitted).

Justice Rehnquist concluded that it may well be that the state would voluntarily undertake to protect against the danger that plaintiff suffered under state tort law, but that "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 1007.

Wentz contends that the State of Oregon owed her a duty to protect her because a "special relationship" existed between her and the State of Oregon as recognized by the Ninth Circuit in *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir.1990). In *Balistreri*, the plaintiff was a woman who had been severely beaten by her husband. She brought an action against state officials under 42 U.S.C. § 1983 alleging that the police had ignored her requests for protection and had refused to act on information that she was in danger. The court concluded that the state's knowledge of her plight and its expression of intent to help her were no greater than that of the plaintiff in *DeShaney* and found that she could not maintain a

claim for a violation of her substantive due process rights. The court stated:

> Several courts have held that, to determine whether a "special relationship" exists, a court may look to a number of factors, including (1) whether the state created or assumed a custodial relationship toward the plaintiff; (2) whether the state affirmatively placed the plaintiff in a position of danger; (3) whether the state was aware of a specific risk of harm to the plaintiff; or (4) whether the state affirmatively committed itself to the protection of the plaintiff.

Balistreri, 901 F.2d at 700.

Wentz contends that she has plead facts sufficient to state a claim because the State of Oregon affirmatively placed her in a position of danger knowing of the danger, and therefore was affirmatively committed to protecting her from the known danger. Wentz argues that when these factors are present, the factor that the state must have created or assumed a custodial relationship over her should give way. Other courts have adopted the position of Wentz. *See Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir.1989). However, this court concludes that the analysis of the source of the protection of the substantive due process clause contained in *DeShaney* does not allow such a result.

In *DeShaney*, the Court explained:

> [i]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 1006. Wentz has alleged no restraint of her individual freedom to act on her own behalf so as to trigger the protections of the due process clause in her case.

It bears repeating that the due process clause does not transform every tort committed by a state actor into a constitutional violation. This court determines only that Wentz has failed to state a claim for a violation of her substantive due process rights under the federal constitution.

Defendants' motion to dismiss (#20) is granted. Defendants' motion for summary judgment (#20) is moot. Wentz's cross-motion for partial summary judgment (#27) is denied. Judgment will be entered for the defendants as of this day.

DATED this 14 day of February, 1991.

[Signature omitted in printing.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed January 5, 1993]

L.W.*,	) No. 91-35449
	)
Plaintiff-Appellant,	) D.C. No. CV-90-0661-FR
	)
v.	) ORDER
	)
DEE GRUBBS, THOMAS NELSON; MARLIN HUTTON; RICHARD HILL; JAMES NANSON,	)
	)
Defendants-Appellees.	)

Before: GOODWIN, TANG and THOMPSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Tang and Thompson have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The case was originally filed under the full name of the plaintiff, but because the disposition called for publication, the court has decided on its own motion to delete the full name of the plaintiff.